Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada),

applicant,

and

United Airlines, Inc.; Continental Airlines, Inc.; and United Continental Holdings, Inc.,

employers,

and

International Association of Machinists and Aerospace Workers,

bargaining agent.

Board File: 29315-C

International Association of Machinists and Aerospace Workers,

applicant,

and

United Airlines, Inc.; Continental Airlines, Inc.; and United Continental Holdings, Inc.,

employers,

and

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada),

bargaining agent.

Board File: 29375-C
Neutral Citation: 2013 CIRB **671**
January 24, 2013

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. John Bowman and Robert Monette, Members.

Counsel of Record

Mr. Anthony F. Dale, for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada);

Mr. Sean FitzPatrick, for the International Association of Machinists and Aerospace Workers;

Mr. Douglas G. Gilbert, for United Airlines, Inc.; Continental Airlines, Inc.; and United Continental Holdings, Inc.

These reasons for decision were written by Mr. Robert Monette, Member.

I–Nature of the Applications

[1] This matter arises out of two applications that were filed with the Board regarding a merger of two airlines: Continental Airlines, Inc. (Continental), and United Airlines, Inc. (United). The first application (Board file 29315-C), filed by the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (CAW) on March 9, 2012, sought a declaration that there was a sale of business further to section 44(2) of the *Canada Labour Code (Part I Industrial Relations)* (the *Code*) and a review of the existing bargaining units in Toronto further to sections 45 and 18.1 of the *Code*. The CAW is certified to represent a group of United employees at the Lester B. Pearson International Airport in Toronto.

[2] The second application (Board file 29375-C), was filed by the International Association of Machinists and Aerospace Workers (IAMAW) on April 13, 2012. That application also sought a sale of business declaration, however, it differed from the CAW application in that it asked the Board to review and merge existing United and Continental bargaining units in Toronto, Calgary and Vancouver to create a single national bargaining unit for the merged corporate entity. The IAMAW is certified to represent a unit of Continental employees at the Lester B. Pearson International Airport in Toronto; a unit of United employees at the Vancouver International Airport, and separate units of United and Continental employees at the Calgary International Airport.

[3] The Board consolidated the two applications at the request of the parties, further to article 20 of the *Canada Industrial Relations Board Regulations, 2012*.

II–Background

[4] In October of 2010, Continental Airlines, Inc. merged with United Airlines, Inc. The two entities have subsequently integrated their operations and are now being operated as a single airline.

[5] The IAMAW and the CAW hold certificates with United or Continental to represent primarily customer service agents at airports in Vancouver, Calgary and Toronto. The IAMAW certification in Vancouver includes employees who perform some baggage handling work, which is not the case for the bargaining units in Calgary or Toronto. The IAMAW certification with United in Vancouver dates back to 1973. The CAW unit at United in Toronto was certified in 1990. The IAMAW bargaining unit at United in Calgary was certified in 2000. The IAMAW bargaining units with Continental in Toronto and Calgary were both certified in 2010.

[6] The units were all organized and certified on an airport by airport basis. Numerous collective agreements have been successfully negotiated at the various airports without work stoppages. At least some of the most recent negotiations, such as the Continental agreements at Calgary and Toronto, have been negotiated since the airline merger took place.

[7] The existing collective agreements differ in their terms and conditions. There are significant differences between the Toronto collective agreements and the agreements in Vancouver and Calgary. In the most recent set of negotiations between the IAMAW and the employer in Calgary and Vancouver, the parties agreed to an inter-bargaining unit seniority list and enhanced mobility between the Calgary and Vancouver bargaining units. Bargaining unit employees have not historically moved from airport to airport.

[8] In a previous letter decision (2012 CIRB LD 2854) dated August 1, 2012, the Board granted the sale of business applications and agreed that a review of the existing bargaining unit structure was required. The Board then gave the parties an opportunity to agree on a proposed bargaining unit configuration, as required by section 18.1(2)(*a*) of the *Code*.

[9] The parties were unable to reach an agreement regarding the bargaining unit issue. At the Board's request, further submissions were filed by the parties. These positions are summarized below.

III–Positions of the Parties

A–The CAW

[10] Counsel for the CAW argued that the two existing bargaining units in Toronto should be merged into one unit, and that a representation vote should be ordered to decide which union, the CAW or the IAMAW, would represent the employees in the merged unit. The CAW noted that all parties agreed that consolidation of the two Toronto units was required, and that the only issue in dispute was whether the consolidation should include bargaining units in Calgary and Vancouver.

[11] The CAW took no position regarding the bargaining unit configuration for either Vancouver or Calgary, other than to say that any consolidation of the Calgary and Vancouver units should not include the Toronto bargaining unit. The CAW stated that it is "doubtful" that there is any community of interest between the Toronto employees of United/Continental and the United/Continental employees in Calgary and Vancouver.

[12] Additionally, the CAW noted that despite its arguments that one national bargaining unit was required, the IAMAW was able to successfully conclude negotiations regarding new collective agreements for its Vancouver and Calgary employees under the existing airport-based bargaining unit structure. This shows that the existing airport by airport bargaining unit structure continues to be viable and that there has not been sufficient evidence provided for the Board to depart from that model and move to a national bargaining unit structure as requested by the IAMAW.

B–The IAMAW

[13] Counsel for the IAMAW notes that the test in a bargaining unit review arising from a sale of business is different from a bargaining unit review under section 18.1(1) of the *Code*, which requires the party seeking to change the bargaining unit structure to demonstrate that the existing units are no longer appropriate for collective bargaining. A bargaining unit review further to a section 45 declaration requires a different test with a "lower threshold" than that required under section 18.1(1).

[14] The IAMAW further submits that the work performed by the bargaining unit employees at the three airports is similar, and that the employer is seeking common terms and conditions for all of its employees across the country. This means that all of the employees at the various airports have a community of interest, which would be addressed by having them all within one bargaining unit and one set of negotiations.

[15] The IAMAW submits that its collective agreements in Calgary and Vancouver contain provisions for inter-unit job security and mobility, which demonstrate a community of interest between those groups despite the fact they work at different airports. The IAMAW also argued that it would be more administratively efficient to have one bargaining unit rather than multiple units.

[16] The IAMAW acknowledged that the existing bargaining unit structure had resulted in collective agreements being reached without work stoppages, but submitted that this was a "minimal standard". It added that a national bargaining unit structure would give all employees the chance to participate meaningfully in collective bargaining based on a close community of interest with employees at other airports.

C–United and Continental

[17] Counsel for the employer submits that the existing airport by airport bargaining unit structure continues to be viable and that the IAMAW has not provided evidence to justify changing to a national bargaining unit structure. The employer further submits that where a party seeks to impose a national bargaining unit structure, as the IAMAW is attempting to do in this case, it must be shown that the existing units are inappropriate.

[18] The employer submits that the existing airport-based certification system has proven itself over many years since the original unit was certified in 1973. Many successful sets of negotiations have taken place without work stoppages. The employer further notes that the IAMAW has been able to negotiate increased mobility and an inter-unit seniority agreement between Vancouver and Calgary employees, even though there are separate agreements at each airport.

[19] The employer argues that there are significant differences in the existing collective agreements; particularly between the Toronto unit and the units in Western Canada. It noted that these historical and market differences would have to be disturbed if the Board were to order a single national bargaining unit and collective agreement.

[20] The employer submits that the existing airport-based unit structure should continue and that the Board should limit any changes to the existing bargaining units to addressing the "overlap" between the CAW and the IAMAW units in Toronto.

IV–Applicable *Code* Sections

[21] Once the Board finds that a sale of business has occurred, which is the case here, the Board's authority to review the existing bargaining unit configuration is set out in sections 18.1 and 45 of the *Code*, which read as follows:

> 18.1 (1) On application by the employer or a bargaining agent, the Board may review the structure of the bargaining units if it is satisfied that the bargaining units are no longer appropriate for collective bargaining.
>
> (2) If the Board reviews, pursuant to subsection (1) or section 35 or 45, the structure of the bargaining units, the Board
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> (*a*) must allow the parties to come to an agreement, within a period that the Board considers reasonable, with respect to the determination of bargaining units and any questions arising from the review; and
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> (*b*) may make any orders it considers appropriate to implement any agreement.
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> (3) If the Board is of the opinion that the agreement reached by the parties would not lead to the creation of units appropriate for collective bargaining or if the parties do not agree on certain issues within the period that the Board considers reasonable, the Board determines any question that arises and makes any orders it considers appropriate in the circumstances.
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> (4) For the purposes of subsection (3), the Board may
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> (*a*) determine which trade union shall be the bargaining agent for the employees in each bargaining unit that results from the review;
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> (*b*) amend any certification order or description of a bargaining unit contained in any collective agreement;
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> (*c*) if more than one collective agreement applies to employees in a bargaining unit, decide which collective agreement is in force;
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> (*d*) amend, to the extent that the Board considers necessary, the provisions of collective agreements respecting expiry dates or seniority rights, or amend other such provisions;
>
> (*e*) if the conditions of paragraphs 89(1)(*a*) to (*d*) have been met with respect to some of the employees in a bargaining unit, decide which terms and conditions of employment apply to those employees until the time that a collective agreement becomes applicable to the unit or the conditions of those paragraphs are met with respect to the unit; and
>
> (*f*) authorize a party to a collective agreement to give notice to bargain collectively.
>
> ...

45. In the case of a sale or change of activity referred to in section 44, the Board may, on application by the employer or any trade union affected, determine whether the employees affected constitute one or more units appropriate for collective bargaining.

V–Analysis and Decision

[22] Section 16.1 of the *Code* provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed the submissions from the parties and the materials on file, the Board is satisfied that the documentation before it is sufficient for it to decide this matter without an oral hearing.

[23] As the parties have noted, this is not an application for a bargaining unit review under section 18.1 of the *Code*. Our review of the existing bargaining unit structure in this case arises directly from our previous finding that a sale of business has occurred, further to section 44 of the *Code*. It is clear from previous Board jurisprudence that a bargaining unit review arising from a sale of business declaration does not require a finding that the existing bargaining units are inappropriate before the Board can change the existing bargaining unit configuration. In *Viterra Inc*, 2009 CIRB 465, the Board described the difference between the two bargaining unit reviews as follows:

> [9] Section 18.1 of the *Code* establishes the regime for a bargaining unit review. A trade union or an employer can ask the Board at any time for a review of bargaining units under section 18.1(1). However, to obtain a review, an applicant must first convince the Board that the current bargaining units "are no longer appropriate for collective bargaining": *Expertech Network Installations Inc.*, 2002 CIRB 182 at para 108.
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> [10] The threshold is lower following a single employer declaration under section 35 or a sale of business declaration under section 44. The Board may intervene to conduct a review without a party having to demonstrate that the existing bargaining units are no longer appropriate for collective bargaining: *Expertech Network Installations Inc, supra*, at para 109.

[24] In *Viterra Inc., supra*, the Board described the factors that it considers when reviewing bargaining units following a sale of business declaration, quoting the following passages from a previous Board decision in *BCT.TELUS et al.*, 2000 CIRB 73:

> [17] The Board has developed well-established principles and criteria that it will consider when determining the appropriateness of a bargaining unit or when reviewing and reconfiguring existing bargaining units. In making such a determination, the Board will weigh and consider a number of factors, including the following: community of interest; viability of the unit; employee wishes; industry practice or pattern; the history of collective bargaining with the employer; the organizational structure of the employer; and the Board's general preference for broader-based bargaining units, for

reasons such as administrative efficiency and convenience in bargaining, lateral mobility of employees, common framework of employment conditions and industrial stability (see *AirBC Limited* (1990), 81 di 1; 13 CLRBR (2d) 276; and 90 CLLC 16,035 (CLRB no. 797), and *Canada Post Corporation* (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRB no. 675)). A good description of the Board's approach is outlined in *Quebec North Shore & Labrador Railway Co.* (1992), 90 di 110; and 93 CLLC 16,020 (CLRB no. 978), where it stated the following:

> The tests for determining whether a unit is appropriate for collective bargaining take into account the interests of both the employees and their employer. Without claiming to make an exhaustive list of these factors, we would note, *inter alia*, the community of interest among the employees, the method of organization and administration of the business, the history of collective bargaining with the employer and in the industry in question, whether the employees are interchangeable and the interests of industrial peace. The tests may have different weight, depending on the individual case, particularly in terms of whether it is an application for certification or an application for review. In the first situation, the Board must allow the employees to have access to collective bargaining. In the second, it must examine the existing bargaining structure in order to make the bargaining process and the application of the collective agreements more effective. However, it must always try to balance what are often divergent interests in determining viable bargaining units and in order to ensure effective bargaining and the most harmonious labour relations possible.
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> (pages 123–124; and 14,147–14,148)

[25] In *Viterra, supra*, the employer sought to merge seven different bargaining units in three provinces into one bargaining unit. While the Board agreed to merge some of the bargaining units, it did not agree to merge them all into a single unit. In reaching that decision, the Board noted the following:

> [45] But the fact that an employer has legitimately decided to reorganize itself does not mean that its bargaining units therefore must be changed to reflect its new organizational structure. Rather, the bargaining unit structure is a fact that an employer must keep in mind when organizing itself. It can organize itself as an indivisible undertaking; but it still has to work with the existing bargaining unit structure, unless it can convince the Board to modify it.

[26] While there is clearly a lower threshold for a party seeking to change the existing bargaining unit structure following a sale of business than there is under a section 18.1 bargaining unit review, there is still an onus on the party seeking the change to convince the Board, using the criteria set out in *BCTELUS et al., supra*, that a change to the existing structure is required in order to achieve improved and more effective industrial relations.

[27] In a more recent Board decision, *G4S Secure Solutions (Canada) Ltd.*, 2012 CIRB 625, the Board was required to determine the appropriate bargaining unit(s) in the context of various certification applications for airport security screeners. The bargaining units had originally been organized on an airport by airport basis, however, the employer, which had recently taken over the contract to provide security screening services, sought to amalgamate the various certifications into one certification covering all of the Pacific region (British Columbia and the Yukon). After reviewing such factors as community of interest, the employer's organizational structure, and the viability of the existing units, the Board decided to maintain the existing airport-based certification configuration. In doing so, the Board noted:

> [59] Numerous employers in the federal jurisdiction, particularly those involved in the transportation industry, operate in a number of locations and yet have bargaining units that are certified on a local basis. The allegation that such units jeopardize industrial stability is simply not supported by any factual evidence. When balancing employees' statutory right to freedom of association and access to collective bargaining with considerations of an employer's organizational structure, it is the Board's view that an employer may sometimes be required to tolerate a certain level of administrative inconvenience, if that is what is required to give effect to the employees' right to select the bargaining agent of their choice.

[28] We will now review the facts of this case taking into consideration the Board's jurisprudence as noted above. The units in question were originally organized on the basis that the employees working at a particular airport shared a community of interest. The IAMAW submits that the employer is seeking a common set of terms and conditions in collective bargaining–an assertion that the employer denied–and that this means that a unit of employees at the three airports will result in better industrial relations and more effective collective bargaining. Despite this assertion, the parties have continued to successfully negotiate collective agreements without work stoppages following the merger of Continental and United. While it is not surprising that an employer (or a union), might seek to negotiate certain common terms and conditions when negotiating collective agreements for different bargaining units, it is not clear that forcing employees into a common bargaining unit is necessary to improve industrial relations. Nothing prevents a union or an employer from coordinating its collective bargaining between different units. In fact, it would appear that in recent negotiations, the IAMAW did just that when it negotiated common inter-unit seniority provisions between its Vancouver and Calgary bargaining units. Even if the Board accepts the IAMAW's assertion that the employer is seeking to negotiate common terms and conditions for all of its collective agreements across the

country, it has not convinced the Board that the creation of a national bargaining unit instead of airport-based units is necessary to effectively respond to such demands.

[29] When considering the viability of the current bargaining unit structure, the Board finds that the existing airport by airport certification scheme has proven itself to be viable over many years. The various parties have been consistently able to achieve collective agreements without work stoppages. While the IAMAW has called this a "minimal standard" when evaluating the viability of the existing units it is the standard that the Board normally considers when looking at the practice and procedure of collective bargaining between the parties. The history of collective bargaining between these parties to date has been a model of industrial stability. This is a factor that supports the maintenance of the existing airport by airport certification structure. The fact that there continues to be significant regional differences in the collective agreements and the lack of evidence suggesting any mobility of employees between the various bargaining units also support the continuation of the existing bargaining unit configuration.

[30] In short, the Board has not been convinced that the status quo of airport-based certification should be changed. The only changes that will be made to the existing certifications will be those that are necessary due to the merger of United and Continental into one entity. This will require that the two certifications in Toronto and the two certifications in Calgary be merged to reflect what is now a single employer. The Board therefore orders that:

i) A representation vote will be held between the CAW and the IAMAW to determine which union will represent the employees at Toronto's Pearson International Airport. An officer of the Board will contact the parties in the near future to discuss the logistics of the vote.

ii) The two certificates held by the IAMAW in Calgary will be merged into one. The Board notes that there is different wording in the two existing certificates. The parties are asked to provide the Board with agreed upon wording for the certification order **within ten days** from the issuing of this decision. If the parties cannot agree on the wording, they are requested to each provide the Board with proposed wording within the same ten day period and the Board will determine the matter.

iii) There will be no change to the existing certificate held by the IAMAW in Vancouver.

[31] This is a unanimous decision of the Board.

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

Robert Monette
Member